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IN THE

Supreme Court of the United States

October Term, 1968

No. 14[redacted] 94

JOHN A. ACREE, et al.,

Petitioners,

versus

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and EASTERN AIR LINES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

SAMUEL J. COHEN,
Attorney for Respondent
Air Line Pilots Association
605 Third Avenue
New York, New York 10016

COHEN and WEISS
HENRY WEISS
ROBERT S. SAVELSON,
of Counsel

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No. 1430

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Petitioners,

versus

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and EASTERN AIR LINES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit, dated February 13, 1968, not yet officially reported, is reported unofficially at 57 CCH LC ¶12,482 and 68 LRRM 2117. The opinion of the United States District Court for the Northern District of Georgia, dated January 25, 1967, has not been reported.

Jurisdiction

The judgment sought to be reviewed herein was entered on February 13, 1968. The petition for a writ of certiorari was received by counsel for respondent Air Line Pilots Association, International on May 17, 1968. Petitioners state that the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

The relevant provision of the Railway Labor Act, 45 U.S.C. §152, Ninth, is set forth in the Appendix hereto.

Questions Presented

1. Is the instant complaint on behalf of all former Eastern flight engineers barred by *res judicata* where the same claims, issues and requests for relief have previously been determined adversely to petitioners in prior litigation on behalf of all former Eastern flight engineers by FEIA, their collective bargaining representative?

2. Following National Mediation Board certification of ALPA as the collective bargaining representative for Eastern's flight engineers, do the federal Courts lack subject matter jurisdiction to decide representation matters within the scope of Section 2, Ninth of the Railway Labor Act and claims which constitute a collateral attempt to nullify ALPA's certification under the Act?

Statement of the Case

Respondent Air Line Pilots Association, International ("ALPA") is the certified collective bargaining repre-

sentative under the Railway Labor Act (the "Act"), 45 U.S.C. § 151, *et seq.*, of flight engineers employed by respondent Eastern Air Lines, Inc. ("Eastern"). ALPA also represents all other pilots employed by Eastern.

Petitioners, former Eastern flight engineers, sue here individually and on behalf of all 637 flight engineers employed by Eastern on June 22, 1962 (P.A. 1-2).* These 637 flight engineers, including the named petitioners, were, as of June 22, 1962, represented by EAL Chapter, Flight Engineers International Association ("FEIA") (89a).**

The instant complaint, allegedly based upon the Railway Labor Act, seeks injunctive relief, including an order directing Eastern to reinstate petitioners as flight engineers, a judgment declaring that respondents' conduct prior to and during the 1962 strike by petitioners against Eastern amounted to a conspiracy to deprive them of their employment, and a judgment of more than twenty-nine million dollars in compensatory and punitive damages against ALPA (P.A. 28-31).

The controversy underlying this complaint is far from a matter of first impression. It has been the subject of constant litigation for almost six years, during which judicial and administrative forums have issued numerous determinations in proceedings in which petitioners' privies were parties. In every instance, claims identical to or comprehensive of those set forth in the complaint in this action have been rejected. The following history of this dispute is based upon both the actual record herein and earlier

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* References designated "P.A." are to the multilith Appendix of Petitioners in the Court of Appeals.

** References followed by the letter "a" are to the Appendix of Respondent ALPA in the Court of Appeals.

judicial and administrative proceedings, all of which were before the Court of Appeals when it dismissed this action.*

A. Background of dispute

Federal Air Regulations require that certain large commercial aircraft be manned by at least three persons, a pilot, a copilot, and a third crew member who must possess a flight engineer's certificate issued by the Federal Aviation Administration. Since the advent of jet airline operations, ALPA has urged that the third crew member on jet aircraft should also possess pilot qualifications. This has also been the view of several Presidential Emergency Boards appointed under Section 10 of the Railway Labor Act, as well as President Kennedy's 1961 Commission ("Feinsinger Commission") on the crew complement controversy (P.A. 113-146).

FEIA, then the authorized representative for Eastern's flight engineers, took an opposite position. FEIA argued that jet flight engineers should instead be qualified, in addition to the flight engineer certificate, as licensed aircraft mechanics with so-called "A & E" or "A & P" mechanic's licenses.

In 1958, FEIA, rejecting recommendations of a Presidential Emergency Board, struck Eastern for 38 days in

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* For Federal Court decisions, see: *FEIA* v. *Eastern and ALPA*, preliminary injunction denied 45 CCH LC ¶ 17,814 (S.D.N.Y. 1962), *aff'd* on other grounds 311 F. 2d 745 (2nd Cir. 1963), *cert. den.* 373 U.S. 924 (1963); summary judgment granted 242 F. Supp. 701 (1965), *aff'd* 359 F. 2d 303 (2nd Cir. 1966); *FEIA* v. *Eastern*, 208 F. Supp. 182 (S.D.N.Y. 1962), *aff'd per curiam* 307 F. 2d 510 (2nd Cir. 1962), *cert. den.* 372 U.S. 945 (1963); *FEIA* v. *Civil Aeronautics Board*, 132 F. 2d 317 (D.C. Cir. 1964); *FEIA* v. *National Mediation Board*, 230 F. Supp. 611 (D.D.C. 1964), *aff'd* 338 F. 2d 280 (D.C. Cir. 1964); *Lind and Brunsgaard* v. *National Mediation Board*, unreported (Dist. Col. No. 1236-64, oral opinion of Judge William B. Jones, transcript pp. 67-68; *aff'd* D.C. Cir. No. 18,864-1965).

protest against a pilot qualification requirement for flight engineers on jet equipment. That strike was resolved by an agreement providing in effect for a four man jet crew consisting of two pilots, a mechanic-qualified flight engineer, and a third pilot qualified crew member. Eastern's jet aircraft were flown by a crew of four until 1962, while flight engineer strikes and repeated attempts by Presidential Commissions and Presidential Emergency Boards failed to result in any alternative solution to Eastern's crew complement problem acceptable to FEIA.

B. The 1962 FEIA strike and the replacement of the striking flight engineers.

On June 23, 1962, FEIA, after rejecting a request of President Kennedy to arbitrate its differences with Eastern, struck Eastern once again, causing the complete shutdown of the carrier's operation. That strike began two days after flight engineers on another airline, TWA, had reached a crew complement settlement based upon the Feinsinger Commission reports and similar to that proposed by Eastern (P.A. 164-175).

In mid-July 1962, after nearly a month of efforts by the federal government to settle the strike and by Eastern to secure a settlement modeled on the TWA agreement, Eastern offered to provide pilot training to the striking flight engineers in order to qualify them for occupancy of the third seat in a three man jet crew. FEIA rejected Eastern's offer and continued the strike. Eastern then made the same offer individually to each of the striking engineers, including petitioners, informing them that if they did not report to work by July 24, 1962, they would be replaced. Eastern's final offer to the striking flight engineers was made on August 10, 1962. As a result, a total of some 102 striking flight engineers returned to service and are today in Eastern's employ.

Eastern began to replace the striking flight engineers on August 10 and on August 25, it notified all of the flight engineers still on strike that they had been permanently replaced.

C. Litigation since the 1962 FEIA Strike.

1. *FEIA's actions in the federal Courts in New York.*

In the summer of 1962, FEIA, acting on behalf of the same 637 persons for whose benefit this action was brought, initially sued Eastern in the United States District Court for the Southern District of New York. The District Court, reviewing the history of the dispute in detail, denied a preliminary injunction on the grounds that FEIA had shown no convincing evidence of unfair labor practices and no reasonable chance of success upon trial. *FEIA* v. *Eastern,* 208 F. Supp. 182 (S.D.N.Y.), *aff'd per curiam* 307 F. 2d 510 (2nd Cir. 1962), *cert. den.* 372 U.S. 945 (1963).

FEIA also initiated a second action in the same Court, this time against both Eastern and ALPA. In summary, FEIA alleged that Eastern and ALPA were parties to a conspiracy to defeat the rights of FEIA and the striking flight engineers (including petitioners) under the Railway Labor Act, and sought, *inter alia,* injunctive relief, reinstatement of strikers and substantial money damages. FEIA's motion for a preliminary injunction was denied with findings on the merits that the procedures under the Act had been exhausted so that the parties could resort to self-help and that Eastern had bargained in good faith. The District Court further held that "[t]he allegation of a conspiracy between the defendants is also without merit." *FEIA* v. *Eastern and ALPA,* 45 CCH LC ¶17,814 (S.D. N.Y. 1962), *aff'd* on other grounds, 311 F.2d 745 (2nd Cir. 1963), *cert. den.* 373 U.S. 924 (1963).

The first of the two New York actions having been discontinued, Eastern and ALPA moved for summary judg-

ment in the second one. The District Court decision granting these motions on the grounds of no evidence of violations of the Act and lack of subject matter jurisdiction was affirmed by the Court of Appeals. *FEIA* v. *Eastern and ALPA*, 243 F. Supp. 701 (S.D.N.Y. 1965), *aff'd* 359 F.2d 303 (2nd Cir. 1966).

2. *Representation proceedings before the National Mediation Board and resulting litigation.*

The replacements employed by Eastern to fill the positions vacated by the striking petitioners had no collective bargaining representation. To remedy that situation, ALPA, on October 4, 1963, requested that the National Mediation Board investigate and certify a representative for Eastern's flight engineers under Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth.

FEIA thereafter requested the National Mediation Board to suspend processing ALPA's application. When the Board refused, FEIA sought to prevent the representation election by an action in the District Court for the District of Columbia. FEIA's motion for a preliminary injunction was denied. *FEIA* v. *National Mediation Board*, 230 F. Supp. 611 (D.D.C. 1964), *aff'd* 338 F.2d 280 (D.C. Cir. 1964).

In its brief on FEIA's appeal, the Mediation Board stated:

> "Preliminarily, we should like to reiterate just what the NMB did and what it did not do. The Mediation Board received and considered all statements, documents, and other material submitted by FEIA, as well as by Eastern and ALPA, relating to FEIA's charges of unlawful conduct (Affidavit of E. C. Thompson, pp. 2, 4-5). The NMB reviewed the complete records in both New York cases and the CAB case, as well as the results of its own field investigation (Affidavit of Weiss, p. 9; affidavit of E. C. Thomp-

son, p. 5; affidavit of O'Neill, pp. 2-5). The Board determined that FEIA's strike against Eastern was an economic strike and that Eastern, therefore, had a right to permanently replace the strikers (Affidavit of Weiss, p. 9; affidavit of O'Neill, pp. 4-5). Cf., *NLRB* v. *McKay Radio & Tel. Co.*, 304 U.S. 333 (upholding an employer's right to permanently replace economic strikers). Finally, the NMB determined that to the extent, if any, that FEIA's charges might have a bearing upon the conduct of the representation election, and except for raising an issue of voter eligibility, the charges 'were so lacking in merit as not to warrant a special hearing and that no interference with the employees' choice of representatives could be shown' (Affidavit of O'Neill, p. 3). The only significant question found by the NMB to have been raised by FEIA's charges, related to which persons were eligible to vote; and, accordingly, the NMB directed a hearing on this issue (Exhibit 1 to the affidavit of I. J. Gromfine).

Thus, if it be assumed that the appellant's charges might have had a bearing upon the conduct of the representation election by the NMB over and above the question of voter eligibility and should have been considered by the Board, still the appellant would have no legitimate complaint. The Board did receive the results of its field investigation as well as other evidence upon them, did consider them, and found them to be without merit. The only action which the NMB failed to take was to hold a hearing upon the general charges of unlawful conduct. However, it is well-settled that the NMB need not hold hearings in connection with certification proceedings and may satisfy its statutory duty 'to investigate' by other methods. *Switchmen's Union* v. *National Mediation Board, supra*, 320 U.S. at 304; *Air Line Stewards and Stewardesses Ass'n.* v. *National Mediation Board, supra*, 314 F. 2d at 911; *WES Chapter* v. *NMB, supra*, 314 F. 2d at 237; *Ruby* v. *American Airlines, Inc., supra*, 323 F. 2d at 255." (Brief, pp. 32-33).

On June 4, 1964, ALPA, which won the election, was certified by the Mediation Board as the collective bargain-

ing representative for Eastern's flight engineers. Thereafter, in *Lind and Brunsgaard* v. *National Mediation Board,* an unreported action in the District Court for the District of Columbia to nullify ALPA's Mediation Board certification, two FEIA members claimed that the Board utilized an improper form of ballot in the representation election (Dist. Col. No. 1236-64). On August 6, 1964, the District Court, after concluding that the individual plaintiffs were bound by FEIA's failure to raise issues concerning the form of the ballot during proceedings before the Mediation Board, entered summary judgment against the plaintiffs, and dismissed the complaint. (Oral opinion of Judge William B. Jones, transcript, pp. 67-68). The District of Columbia Court of Appeals affirmed that result (D.C. Cir. No. 18,864-1965).

3. *Proceedings before the Civil Aeronautics Board*

On September 10, 1962, FEIA filed a complaint with the Civil Aeronautics Board (CAB Docket 14009) alleging that Eastern had violated Section 401(k)(4) of the Federal Aviation Act, 49 U.S.C. § 1371(k)(4), which makes it a condition upon the holding of a certificate by an air carrier that it comply with the Railway Labor Act. FEIA sought relief including reinstatement of the strikers.

The dismissal of this complaint (CAB Order No. E-19923, August 19, 1963) was upheld by the Court of Appeals for the District of Columbia. *FEIA* v. *Civil Aeronautics Board,* 332 F.2d 317 (D.C. Cir. 1964).

On September 9, 1966, FEIA filed in CAB Docket 14009 a document entitled "Petition to Renew Complaint and Reinstitute Enforcement Proceedings" (1a-8a). That Petition stated:

> "EAL Chapter has submitted this Petition for, and on behalf of, the strikers for the sole purpose of gaining reinstatement for them." (17a).

The "strikers" referred to include petitioners. FEIA's petition covered essentially the same matters dealt with in all prior litigation and the complaint herein (1a-8a).

On January 10, 1967, the Director of the Civil Aeronautics Board's Bureau of Enforcement denied FEIA's petition (19a-31a), stating in part:

> "The sole issue presented by EAL Chapter is whether the Board should order Eastern to re-employ an unspecified number of flight engineers discharged by it during an economic strike. This issue was litigated before the National Mediation Board and before the courts and in each instance decided adversely to EAL Chapter." (29a).
>
> * * *
>
> "It would not serve the national interest, the purposes of the Act or the Railway Labor Act for the Board to consider reopening this controversy, especially in the face of the unanimous decisions of the courts and the Mediation Board adverse to the complainant." (30a).

FEIA's petition for review of the refusal to institute enforcement proceedings (32a) was denied in CAB Order E-24939, issued April 4, 1967 (36a).

D. The complaint in this action

The Court below found that the instant complaint stated the same cause of action as the New York complaint. Comparison of the complaint in this action with the complaint in *FEIA* v. *Eastern and ALPA*, *supra*, shows:

1. Paragraph 51 of the dismissed New York complaint states:

> "The unlawful discharges of the Flight Engineers by Eastern, and the unlawful refusal of Eastern to reinstate the Flight Engineers to their employment have caused plaintiff and the members represented

by it, damage in the amount of $11,500,000 for back wages and other fringe benefits."

Paragraph 78 of the instant complaint likewise alleges that the discharge and failure to reinstate petitioners has deprived each of them of at least $10,000 annually, and paragraph 84 of the complaint seeks general or compensatory damages for such conduct in the amount of $17,390,100 (P.A. 27, 29).

2. Paragraph 52 of the dismissed New York complaint alleged that Eastern violated the Railway Labor Act by provoking the strike, which thereby became an unfair labor practice strike from its inception. Paragraphs 57, 58 and 63 of the complaint herein allege that Eastern and ALPA provoked and forced petitioners to strike for the purpose of confiscating their jobs (P.A. 21-23).

3. Paragraph 54 of the dismissed New York complaint alleges that Eastern accorded super-seniority to the strike replacements and discriminated against the strikers in violation of the Railway Labor Act. Paragraphs 39, 56 and 77 of the instant complaint are to the same effect, and paragraph 56 specifically alleges that respondents' objective was to confer super-seniority upon the employees who replaced petitioners (P.A. 16, 21, 26-27).

4. Paragraph 55 of the dismissed New York complaint alleges that Eastern unlawfully discharged and refused to reinstate the strikers. Paragraphs 64 and 65 of the complaint herein contain similar allegations (P.A. 23-24).

5. Paragraph 56 of the dismissed New York complaint alleges a conspiracy between Eastern and ALPA to confer petitioners' jobs upon pilots. Paragraph 66 of the complaint in this action alleges the same conspiracy claim (P.A. 24).

6. Paragraph 58 of the dismissed New York complaint alleged that Eastern's conduct prolonged the strike and converted it into an unfair labor practice strike. The allegations in paragraph 66 of the complaint in this action are to the same effect (P.A. 24).

7. In the New York action, plaintiffs prayed that the Court:

> "(4) Issue a mandatory injunction against Eastern ordering and directing it to offer to the striking flight engineers reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, and ordering and directing Eastern to dismiss, if necessary, any employees hired to replace the striking Flight Engineers;"

Paragraph 81 and paragraph (d) of the prayer for relief of the complaint in this action seek the same relief (P.A. 28, 30-31).

E. The relationship between FEIA and petitioners

The Court below found that petitioners are, for *res judicata* purposes, privies of FEIA. In addition to other matters in the record, depositions of petitioners Acree, Severn and Crabtree in this action contain the following admissions:

1. All petitioners are FEIA members (97a). Acree held office in FEIA as Atlanta Base Chairman on three different occasions, including a term covering the period when the 1962 FEIA strike began (67a-68a).

2. Petitioner Acree picketed and supervised picketing activities on behalf of FEIA in each year during the period 1962-1965 (67a, 72a). As of August 5, 1965, the date of his deposition, he had picketed as recently as June 23, 1965 (67a). All of the petitioners have on one or more occasions

picketed on behalf of FEIA (72a). All 637 persons for whose benefit this action is brought have picketed on behalf of FEIA in this dispute (91a).

3. FEIA represented all 637 of the persons on whose behalf this action is brought, including the 6 named petitioners (69a, 89a).

4. Petitioners have regularly received FEIA newsletters, and have been made aware by FEIA of the status of the several proceedings brought by FEIA against Eastern and ALPA (69a-70a). Petitioners have been aware that it was an objective of FEIA in those proceedings to secure a judgment or order reinstating each individual petitioner to Eastern's employ (82a).

5. Petitioners, in deciding to postpone the commencement of this action, agreed among themselves to await the outcome of the several pending actions which had been brought by FEIA respecting this controversy (52a-59a).

Argument

I.

There is no reason for further review of the Court of Appeals decision based upon Res Judicata.

This action, commenced three years after the underlying events, represents petitioners' attempt to relitigate the same charges and reinstatement and damage claims which have previously been rejected in all prior litigation since 1962. It is indeed significant that petitioners, in initially deciding to postpone this action, agreed among themselves to await the outcome of pending FEIA litigation based upon the controversy (52a-59a) and then filed the instant complaint on July 21, 1965, just one week (P.A. 1) after the District

Court granted summary judgment for defendants in FEIA's New York action.

The Court below held that the instant complaint was barred by the principles of *res judicata*. The Court concluded that the two cases involved the same cause of action and the same parties or their privies. The Court also found that the 1966 Second Circuit decision in *FEIA* v. *Eastern and ALPA*, constituted a final judgment for *res judicata* purposes. As shown below, the Fifth Circuit's decision correctly applies well established principles of law and there is no reason for further review.

Same cause of action

The Court of Appeals, comparing the particular allegations of the New York complaint to that herein (Pet. App. A3-A4),* found that application of any of the established standards for deciding whether two complaints state the same cause of action required a conclusion that the causes of action in New York and herein were identical:

> "Thus the cause of action relied on in the Second Circuit litigation and the one here are identical. The remedy requested is also identical. True the identical words have not been used. The complaints were prepared by different lawyers. But essentially they are the same. What difference exists is in form, and we have long held that in determining *res judicata* it is the substance of the action that counts. 'What is important and determinative now as to the identity of causes of action, is not identity of form, but of grounds.' *Wilson Cypress Co.* v. *Atlantic Coast Line R. Co.*, 5 Cir., 109 F. 2d 623, 627, *cert. denied*, 310 U.S. 653 (1940).
>
> In deciding whether the substances of two actions are for *res judicata* purposes the same, various tests

* References designated "Pet. App." are to the Appendices of the instant Petition for a Writ of Certiorari.

> have been advanced: Is the same right infringed by the same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments? See 1B J. W. Moore, Federal Practice ¶ 0.410[1], pp. 1157-1158 (2d ed. 1965), and cases there cited. Under any of these tests the cause of action in suit here is identical with the cause of action alleged in the New York complaint. There may be some difference in the legal theory supporting the actions, but the substance, for *res judicata* purposes at least, is the same. See *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.*, 5 Cir., 295 F. 2d 362 (1961)." (Pet. App. A4-A5).

Other decisions applying these same tests include *Ballard* v. *First National Bank of Birmingham*, 259 F. 2d 681 (5th Cir. 1958) and *Bennett* v. *Commissioner of Internal Revenue*, 113 F. 2d 837 (5th Cir. 1940).

The Court below also examined and rejected petitioners' contention that the instant complaint raises only individual claims, while the FEIA New York action was restricted to institutional claims of FEIA:

> "It may be true that the New York proceeding covered institutional claims by FEIA as a collective bargaining agent, but the Second Circuit treated it as also including, as it obviously did, individual claims for reinstatement of its members and back pay. Certainly those claims are the same claims being made here, and the alleged bases for those claims are identical with the bases alleged in the New York proceeding. Under the plain allegations of the two complaints, other than Chinese copies it would be difficult indeed to find causes of action and claims for relief more similar than those asserted in the New York action and those asserted here." (Pet. App. A6).

The Court's conclusion that individual claims for reinstatement and damages were presented to and determined by the Second Circuit is fully supported by the record. In

its brief to the Second Circuit, FEIA, with respect to damages, expressly stated in a footnote:

> "5. The Amended Complaint states claims both by EAL Chapter *qua* union and by EAL Chapter on behalf of the individual flight engineers. The District Court was in obvious error in not recognizing these latter claims where it stated, 'FEIA is seeing [sic] global damages for alleged wrong to it and not individual damages for such of its members who may have been wrongfully discharged.' (R. 175) The complaint itself indicates clearly to the contrary." (P.A. 380).

FEIA, after stating that it had previously been suing "to protect its interests *qua* union," (P.A. 381) argued concerning reinstatement:

> "The Amended Complaint, on the other hand, presents claims of quite a different character involving the allegations of wrongful discharge (R. 28), and the request for the reinstatement of 500 flight engineers to their former employment. (R. 33) These claims were never presented before, they have nothing to do with which union is entitled to represent flight engineers, and certainly these claims cannot be said to fall within the exclusive jurisdiction of the Mediation Board. Indeed, unless this court acts, EAL Chapter will have exhausted its efforts to gain reinstatement for the 500 flight engineers." (P.A. 381-382).

In search of some theory to differentiate the instant complaint from the New York action, petitioners have asserted that Eastern and ALPA engaged in conduct contrary to the principles of fair representation set forth in *Bh'd. of Railroad Trainmen* v. *Howard,* 343 U.S. 768 (1952), and that the decision of the Court below is in conflict with *Howard.* There is, however, no conflict of decisions.

Howard held that a union representing white brakemen could not agree with the carrier to displace negro "train porters," who did precisely the same work under a different job title and were in an artificially created separate negro craft solely because of their race. There, the complaint alleged and the Court found "that 'train porters' do all the work of brakemen. : . ."

This action is completely distinguishable from *Howard.* Here, in direct contrast, the complaint expressly alleges that pilots (ALPA's bargaining unit) and flight engineers (petitioners' FEIA unit) perform completely separate and distinct work and job duties, and are in separate distinct job classifications (P.A. 10).

This controlling distinction between petitioners' complaint and *Howard* was recognized by the Fourth Circuit in *Rumbaugh* v. *Winifrede Railroad Co.,* 331 F. 2d 530 (4th Cir. 1964), *cert. den.* 379 U.S. 929 (1964). There, plaintiff argued that the defendant union's duty of fair representation extended to him under the *Howard* case even if he was not employed within the craft bargaining unit represented by the union. The union maintained that Rumbaugh was a supervisor and therefore not within the unit. With respect to the application of *Howard* to this situation, Chief Judge Sobeloff stated:

> "We agree that the [Supreme] Court [in *Howard*] disregarded the *artificial classification* of train porters and brakemen in holding that the union violated its obligation of fair representation by entering into a racially discriminatory collective agreement. But this disregard was a facet of the patently illegal activity of the Brotherhood. *It was the Court's view that the bargaining agent's obligation extended to all who worked in the craft, regardless of job classification.* The Court did not hold that the duty of fair representation extends even to workers, such as supervisors, who are not regarded as 'employees' within the meaning of the Railway Labor Act." 331 F.2d at 534 (emphasis added).

It is also a matter of judicial record that, unlike the "train porters" in *Howard* who were disqualified by their race—which they could not change—petitioners elected to withdraw from Eastern's services in 1962 to engage in an economic strike, and that they subsequently rejected Eastern's written invitation to each of them to return to work. In fact, they were not "displaced" by Eastern; they were replaced because the positions they had vacated and refused to return to during June, July and August, 1962 had to be filled before Eastern could resume airline operations. This fact alone removes this case completely from the scope of the *Howard* doctrine.

Same parties or their privies.

The decision below also examined petitioners' argument that this suit is brought by individuals on behalf of the former Eastern flight engineers while prior litigation was by FEIA (but admittedly on behalf of this same class).

The close and continuing relationship between the petitioners herein and FEIA is apparent from the depositions of petitioners Acree, Severn and Crabtree (43a-113a). All petitioners are FEIA members (97a). FEIA represented all 637 persons on whose behalf this action has been brought, including each of the named petitioners (69a, 89a). And, petitioners have been aware of the status of the numerous proceedings on their behalf against ALPA and Eastern (69a-70a).

Under these circumstances, the Court below properly concluded that petitioners are privies of FEIA, stating in part:

> "In all the prior proceedings the plaintiff was FEIA, an unincorporated association, suing for itself and its members who lost their jobs at Eastern, whereas this is a class action with appellants, members of FEIA, suing individually and for the other members of FEIA who lost their jobs. Thus in effect we have two class actions and the members of the classes are identical." (Pet. App. A6).

This holding of the Court of Appeals is based upon well established law. In *Hansberry* v. *Lee*, 311 U.S. 32 (1940), this Court said:

> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties . . . or where the interest of the members of the class, some of whom are present as parties is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. . . ."

See also *Chicago R. I. & P. Ry. Co.* v. *Schendel*, 270 U.S. 611 (1926); *Kersh Lake District* v. *Johnson*, 309 U.S. 485 (1940); *Ma Chuck Moon* v. *Dulles*, 237 F.2d 241 (9th Cir. 1956), *cert. den.* 352 U.S. 1002 (1957).*

The Fifth Circuit's determination is also completely consistent with recent decisions of this Court overruling the concept that a labor organization does not have the capacity to sue for the benefit of its members or to protect their employment rights against action in violation of federal labor law. For example, compare *Smith* v. *Evening News Association*, 371 U.S. 195 (1962) and *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957) to *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437 (1955). See also *Seafarers Int'l. Union* v. *Board of Trustees of Galveston Wharves*, 351 F. 2d 183 (5th Cir. 1965). Even FEIA, in its Second Circuit brief, argued that it possessed the capacity to sue

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* In addition, there is already a decision in the prior litigation holding that FEIA was authorized to represent the interests of its members and that its representation was conclusive as to their interests. *Lind and Brunsgaard* v. *National Mediation Board, supra.*

for the benefit of its members, stating: "There is no question a union may sue to enforce the mandates of the Railway Labor Act even though the remedy may inure to the benefit of individual employees only." (P.A. 380).

Final judgment

The decision below, after analysis of the Second Circuit's opinion, concluded that the dismissal of the New York action for lack of subject matter jurisdiction constituted a final judgment for *res judicata* purposes. The Fifth Circuit's decision, based upon a prior decision of this Court, stated, in part:

> "It is sometimes asserted that a decision has *res judicata* effect only if it is on the merits. But this overstates the case, for as the Supreme Court has said, 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues.' *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 166 (1932). See also *Estevez* v. *Nebers,* 5 Cir., 219 F.2d 321 (1955)." (Pet. App. A9).

II.

It is settled law that the District Court lacks jurisdiction over the subject matter of this action.

The District Court dismissed the complaint herein on grounds of both *res judicata* and lack of subject matter jurisdiction (Pet. App. C; P.A. 416-421). The Fifth Circuit, finding the action barred by *res judicata,* did not reach the issue of lack of subject matter jurisdiction (Pet. App. A2).

The Fifth Circuit did, however, conclude that the instant complaint and New York action allege the same cause of action. The Second Circuit, affirming summary judgment for defendants, found that this cause of action was beyond the scope of federal Court jurisdiction, stating:

"The allegations in the amended complaint which relate to the replacement of the strikers do not directly challenge the representational decision of the Mediation Board; but the judicial relief requested by FEIA flies 'in the teeth of the board's certification' of ALPA, almost as much as a court order directing an employer not to bargain with a union flies in the teeth of the Board's certification of that union. *Order of Railway Conductors of America* v. *Pennsylvania R.R.*, 323 U.S. 166, 172, 66 S. Ct. 222, 89 L. Ed. 154 (1944). As the complaint itself recognizes, Eastern could afford to reinstate five hundred striking FEIA members only if it dismissed a comparable number of their replacements, most of whom voted for ALPA. The result would be a radical shift in the composition of the work force which might well make possible the ouster of ALPA by FEIA as the bargaining representative of the third-seat occupants.

"The claim for money damages would have a similar effect. If granted in anything like the amounts requested, employers in similar situations in the future would never dare to deal with unions newly certified by the National Mediation Board, until they could obtain declaratory judgments from the courts as to the validity of the ousted union's claim that the Railway Labor Act had been violated—a result which would clash with the evident congressional intent to have disputed questions of representation in an industry so charged with the public interest disposed of rapidly. See *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248, 256 (2nd Cir. 1963), *cert. denied*, 376 U.S. 913, 84 S. Ct. 658, 11 L. Ed. 2d 611 (1964)." 359 F. 2d at 307-308.

The clear lack of District Court jurisdiction over the subject matter of the instant complaint is still another reason why there is no cause for further review. *General Committee, etc.* v. *M-K-T Railway Co.*, 320 U.S. 323 (1943).

Conclusion

The controversy arising from petitioners 1962 strike against Eastern has been the subject of constant litigation since that time. Every aspect of the dispute has previously been examined in detail by federal Courts and administrative agencies.

The record shows that petitioners 1962 strike against Eastern was preceded by their rejection of the recommendations of every neutral body which studied the crew complement problem, including the 1958 Presidential Emergency Board on Eastern, the 1961 Presidential Feinsinger Commission and 1962 Presidential Emergency Board on Eastern. Only two days prior to the strike, on June 21, 1962, TWA flight engineers reached a crew complement agreement along lines recommended by such bodies and consistently urged by federal officials and Eastern. It is, moreover, a matter of judicial record that FEIA alone rejected the recommendation of President Kennedy that the 1962 dispute be arbitrated and that, on June 23, 1962, the first day of the strike, President Kennedy described it as "the height of irresponsibility on their [FEIA's] part." *FEIA* v. *Eastern, supra*, 208 F. Supp. at 186. The plain fact is that the findings in every prior decision on this matter completely controvert all of the material allegations of the instant complaint.

In the present situation, the Fifth Circuit, after examining all of the prerequisites for *res judicata*, and after hearing every conceivable argument in support of petitioners, concluded that they have had their day in court. The Court of Appeals decision correctly applies established principles of law. As shown above, there is no conflict of decisions. And, since the decision below is based upon settled law, this case does not involve issues which merit the attention of this Court.

It should also be noted that the petition for certiorari herein does not conform to Rule 23 of this Court.

Under these circumstances, and for the reasons previously stated, it is submitted that there is no reason for further review and that the petition for a writ of certiorari be denied.

Respectfully submitted,

SAMUEL J. COHEN,
Attorney for Respondent
Air Line Pilots Association,
International
605 Third Avenue
New York, New York 10016
Tel. 914-MU-2-6077

COHEN and WEISS
HENRY WEISS
ROBERT S. SAVELSON
of Counsel

Appendix

Section 2, Ninth of the Railway Labor Act, 45 U.S.C. §152, Ninth, provides:

> "Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."